

Supreme Court, U. S.

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FEB 14 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 88-1267

BILLY D. HICKS,

Petitioner,

—against—

UNITED STATES OF AMERICA, JESSIE P. BARNETT, JR. and BARNETT & SONS SALVAGE, LTD.,

Respondents.

**PETITION OF BILLY D. HICKS FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Billy D. Hicks, prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit affirming a judgment and sentence of the United States District Court for the Northern District of Mississippi

after a jury trial entered on the 30th day of November, 1977 wherein the Petitioner was found guilty of six felony counts as contained in the presented indictment which detailed violations of Secs. 2 and 371, Title 18, and Secs. 321 (f), 331 (a), 331 (k), 333 (b), 342 (a)(1), 342 (a)(2)(c), 343 (a) and 348, Title 21 United States Code by aiding and abetting; conspiracy; interstate shipment of adulterated food; fraudulent sale of misbranded food in interstate commerce.

The opinion of the Court of Appeals is reported at 587 F 2d 252 and a copy thereof is appended hereto (*infra*, pp. 1a to 16a).

Jurisdiction

On January 8, 1979 judgment was initially entered in the United States Court of Appeals, Fifth Circuit, unanimously affirming the judgment of conviction of the United States District Court for the Northern District of Mississippi.

The issuance of the mandate of the Court was stayed until, to and including February 15, 1979 pending the filing of this petition for a writ of certiorari by order entered in the Office of the Clerk of the Court of Appeals on February 5, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1) and Rule 19.1 (b) of the rules of this Court.

Questions Presented

(1) Is the Statute 21 U.S.C. 342 (a) (1) defining adulteration of food so vague and indefinite to be inadequate to satisfy the due process clause of the Fifth Amendment

to the United States Constitution in that it fails to inform the Defendant or any other person of ordinary intelligence of the conduct prohibited by its terms?

(2) Whether application of Section 342 (a) (1) as applied in the trial was *ex post facto* in that it was left to the jury, based on the testimony of the government experts, to determine the standard of law which was allegedly violated, i.e. that the substances found came within the definition of 342 (a) (1).

Constitutional Provisions and Statutes Involved

Fifth Amendment to the Constitution of the United States; Article 1, Section 9 of the Constitution of the United States.

Title 19 U.S.C. Sec. 2 and 371; Title 21 U.S.C. Secs. 321 (f), 331 (a), 331 (k), 333 (b), 342 (a) (1), 342 (a) (2) (c), 343 (a), 346 (a) and 348.

The text of the above are set forth in the Appendix hereto (*infra* pp. 21a et seq.).

Statement of the Case

Billy D. Hicks, a citizen and resident of McGehee, Arkansas, entered into an agreement with Jessie P. Barnett, Jr., of Opelousas, Louisiana, and Richard Flowers of Tunica, Mississippi, wherein it was agreed that Hicks would supply salvage cotton seed which had been treated for planting, to Flowers for processing at Planters Oil Mill in Tunica, into cottonseed meal, hulls and oil. Barnett was to handle the marketing and sale of the meal and did make a contract with Southern Feed Ingredients to Memphis, Tennessee, for the sale of twelve carloads of cottonseed meal.

Approximately 2,000 tons of seed was processed into meal by the Planters Oil Mill, the bulk having been delivered and supplied by third parties, although Hicks did direct the delivery of a substantial portion of the treated seed to the oil mill.

Samples of the meal were taken and forwarded to Barrow-Agee Laboratories in Memphis for chemical analysis. According to the reports, there were only trace elements of poisonous substances.

Southern Feed Ingredients brokered the cottonseed meal to various purchasers, principally animal feed companies, for use as an animal feed ingredient. A railcar load of the meal was tested in Starkville, Mississippi, by the Mississippi authorities and the tests revealed that the meal contained the substance Disyston. The Food and Drug Administration took control of the investigation and the shipments of the meal were stopped.

During the course of a six day trial which commenced on October 25, 1977, pursuant to the Grand Jury's indictment handed down on May 25, 1977, the Government introduced evidence through FDA investigators to show involvement and control by Petitioner Hicks and his co-defendants, Jessie P. Barnett and the Barnett Corporation, and that the cottonseed meal was adulterated. The principal witnesses for the Government, Drs. Buck and Piper, testified as to the harmful effects of the substances, mercury, disyston and PCNB, and to the effect that because of their experience in observing poisoned animals in laboratory tests, that they considered the substances as unsafe.

The Jury received instructions, one of which required the Jury to consider whether or not mercury, disyston and PCNB were unsafe and thus, adulterating food additives.

The Jury found all defendants guilty on the six felony counts. Judgment was entered on November 30, 1977. The United States Court of Appeals for the Fifth Circuit affirmed said judgment on January 8th, 1979.

REASONS FOR GRANTING THE WRIT

I

Hicks is charged with conspiracy to introduce into interstate commerce an adulterated food in violation of 21 U.S.C. 331(a). In describing adulterated food, Sec. 331(a) refers to Secs. 342(a)(1), 346(a) and 342(a)(2)(c) and by reference to Sec. 348.

Generally, the application of these Statutes has been in civil or seizure actions instituted by the Government to halt shipment of, or to condemn certain food items. *United States v. Forty-One Cases* (1970, Fifth Circuit) 420 F. 2d, 1126, and *United States v. Four Hundred Eighty Four Bags, More or Less*, (1970, Fifth Circuit, 423 F. 2d 839).

In attempting to define "adulterated", Sec. 342(a)(1) states that a food shall be deemed to be adulterated "if it bears or contains any poisonous or deleterious substance which may render it injurious to health; * * *".

Section 342 (a)(2)(c) states that a food shall be deemed to be adulterated "if it is, or it bears or contains, any food additive which is unsafe within the meaning of Section 409 (21 U.S.C. 348)."

The foregoing sub-sections each describe a different test as to what is deemed to be adulterated food. However, 342 (a)(1) fails to place one on notice of what may be injurious to health or what does ordinarily cause a food to be adulterated.

It is undisputed that Planters' Oil Mill, Inc., the processor of the cottonseed meal, sent samples of the meal to a laboratory in Memphis for analysis, which reported that the samples contained "less than .01 parts per million" of Disyston, while the report does not indicate whether or not tests were conducted for mercury or PCNB.

It is significant to note that one of the customers of the cottonseed meal also sent samples to the laboratory of the Mississippi State University, which notified that the samples contained Disyston, although the record does not state the quantity. Additionally, the test of the laboratory of Mississippi State University does not report any test for mercury or for PCNB. Later tests of the Food and Drug Administration reveal the presence of mercury, PCNB and Disyston, but does not establish quantities so found. It is common knowledge that the presence of some trace elements or materials does not necessarily fall within the definition of "adulterated" as commonly used. The Government, realizing this proposition put experts in the field of Toxicology on the stand as witnesses to establish that the trace elements or materials were deleterious and injurious to health of animals.

This testimony of the expert witnesses was the subject of objection by the defendant, Hicks, and the testimony was allowed in over his specific objection.

342(a)(1) is silent as to what substances are to be considered deleterious and injurious to health and nowhere does the statute proscribe by quantity the amounts of substances which are to be considered deleterious and injurious to health.

Conversely, it is within the realm of common knowledge that many materials, trace elements or additives, which are considered by themselves to be "harmless" to health, when added to products in sufficient quantities,

become deleterious and injurious to health. The ordinary person in the handling of such products would not be in a position to make this determination and would not be, therefore, aware that he was violating the law.

In the process of establishing as a fact that mercury, disyston and PCNB were unsafe, the Government demonstrated that this knowledge was not unknown, but rather may have been ~~possessed~~ ^{known} only by a select few (it was established that the field of Veterinary Toxicology is a highly specialized area where in the United States only 27 Veterinary Toxicologists have been certified) and it is claimed that the adduction of this ~~proof~~ ^{proof} inveigh against establishing a specific intent necessary to violate the statute which was an essential element of the Government's case.

This fundamental dilemma in the formulation of a criminal statute is recognized in *U.S. v. Insko* (1974 Fifth Circuit) 496 Fed. 2d 204, there the Court stated at Page 208:

"It is a fundamental tenet of our jurisprudence that statutes which proscribe conduct may not be so inartfully worded that persons of common intelligence must speculate as to their meaning. *Lanzetta v. New Jersey*, 1939, 306 U. S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888. Vaguely phrased measures run afoul of substantive due process requirements by failing to convey with reasonable certainty the statute's intended sweep. 'The underlying principle is that no man shall be held criminally responsible for the conduct which he could not reasonably understand to be proscribed.' *United States v. Harris*, 1954, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989."

and in *U. S. v. Halls* (1976) Fifth Circuit, 529 Fed. 2d, 472, the Court stated at Page 479:

"... In its classic formulation of the standard for establishing unconstitutional vagueness, the Supreme Court held that a penal statute 'must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties'. If 'men of common intelligence' must guess at the meaning of a statute, the statute violates due process of law." (Cases cited)

Applying these well settled principles to the case at Bar, it is apparent that 342(a)(1) does not sufficiently proscribe the conduct to be prohibited. If a law embodies a principle which is to guide the actions of people it is fundamental that notice of the prohibited conduct be imparted.

The assertion of vagueness is not predicated upon the notion that the Statute defines an illegal act by reference to the manifest effects of conduct (for example, the commission of acts, which has a bad or a specifically identified criminal result), but rather the complaint is that the Statute condemns conduct, that in the opinion of a limited class, veterinary toxicologists in this case, may be injurious to the health of animals. Conceivably then, one must take judicial notice to such factual opinion and thereby be guided. This would include taking notice of a change in scientific thought the instant it occurred, even if the thought or opinion may be subsequently proved in error. It is obvious that 342(a)(1) contains no definitive standard of criminal conduct—if it did it would not have been necessary for the Government to make this proof in the Court below. As it was, the Jury was asked to pass on a question that ought to have been predetermined by the Congress.

Clearly related to the case of vagueness is the constitutional restraint upon Congress from legislating criminal laws *ex post facto*. Equally, this same restraint applies to the Federal Courts. Contrary to this restraint, we find that the Trial Court left it to the jury to determine the standard of law and to find as a fact whether or not the substances complained of were deleterious and injurious to health. In essence, the jury was left to define a criminal statute where Congress had not, at a point in time subsequently removed from the enactment of the statute.

The Court in *Williams v. United States*, 179 F. 2d 644, at Pg. 647 of the report, stated:

"The Congress and the Federal Court are themselves faced here with the provision of the Fifth Amendment that no person * * * be deprived of life, liberty or property without due process of law, and it is found right in the midst of provisions in the Fifth and Sixth Amendments about Federal prosecutions for crime. It is well understood that due process applies not only to Court procedure, but also to legislation, especially in criminal matters. There are no common law Federal crimes, but all are created by Statute, though common law words in the Statute may take their intended meaning from the common law. Not only must the accusation inform the accused for what he is to be tried, but due process requires that the Statute must inform the citizen in advance by a reasonably ascertainable standard what the crime shall be. A Judge may not establish the standard, say by reasonable interpretation, after the deed is done, for that is in substance to give the Statute life *ex post facto*, which the Constitution forbids also."

It is clear that the Trial Court did in fact instruct the jury to give the Statute "life ex post facto" should the Jury make a positive finding that mercury, disyston and PCNB were potentially harmful and deleterious to health.

Petitioner urges that the Circuit Court erroneously relied on the decision of this Court in *United States of America v. Lexington Mill and Elevator Company*, 232 U.S. 399; 34 Sup. Ct. Rep. 337 as decisive of the constitutional question. In that case the government proceeded by civil libel to seize and condemn the alleged adulterated product and did not proceed by ~~civil~~ ^{CRIMINAL} prosecution as it did in the instant case. This Court did not consider nor pass upon the constitutional questions raised herein by the petitioner which are of a vastly greater dimension than this Court had to consider in the prior case.

CONCLUSION

For the reasons above stated, a Writ of Certiorari should issue to the United States Court of Appeals for the Fifth Circuit, review the Judgment and Decision of that Court affirming the Judgment of Conviction entered herein in the United States District Court for the Northern District of Mississippi.

Respectfully submitted,

EUGENE G. LAMB
Attorney for Petitioner

Dated: Garden City, New York
February 14, 1979

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSIE P. BARNETT, JR., BARNETT & SONS SALVAGE, LTD. and
BILLY D. HICKS,

Defendants-Appellants.

No. 77-5811

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Jan. 8, 1979

Appeals from the United States District Court for the Northern District of Mississippi.

Before COLEMAN, CLARK and RUBIN, Circuit Judges.

COLEMAN, Circuit Judge.

When Theodore Roosevelt was President of the United States, the misbranding and harmful adulteration of foods had become of such nationwide moment that Congress enacted the first Food and Drug Act, 1906.

[1a]

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Eight years later, in an appraisal of the Act, the Supreme Court said:

The statute upon its face shows, that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was, and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court.

United States v. Lexington Mill Company, 232 U.S. 399, 409, 34 S.Ct. 337, 340, 58 L.Ed. 658 (1914).

At a later point in that opinion the Court said:

Congress has here, in this statute, with its penalties and forfeitures, definitely outlined its inhibition against a particular class of adulteration.

232 U.S. at 411, 34 S.Ct. at 340.

From time to time the Act has been amended in the light of new developments and with a view to more ef-

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fectively protecting the general public from foods which may be harmful or which have been misbranded. We have no doubt that the various provisions of the Act are plain, that they suffer from no ambiguity amounting to impermissible vagueness, and that they do not violate the Constitution.

The grand jury for the Northern District of Mississippi indicted Jessie P. Barnett, Jr., Billy D. Hicks, and Barnett & Sons Salvage, Ltd., for criminal violations of these statutes, as well as for a conspiracy to commit those violations.¹

A jury convicted all three defendants on all six counts.

¹ Count 2 charged that on or about September 12, 1975, all three defendants did knowingly, with intent to defraud and mislead, cause to be introduced into Interstate Commerce at Tunica, Mississippi, adulterated bulk cottonseed meal, a food, "which was adulterated in that it contained an added poisonous and deleterious substance, to-wit, mercury, which may have rendered it injurious to health, and contained unsafe food additives, to-wit, the fungicide PCNB (pentachloronitrobenzene) and the insecticide Disyston (O, O-diethyl S-(2-Enthylthio) ethyl) phosphorodiathioate, in violation of Section 331 (a), 333(b), 342(a)(1), 342(a)(C), and 348 of Title 21, and of Section 2 of Title 18 of the United States Code".

Counts 3, 4, and 5 charged the defendants with committing the same offenses on September 19, 1975, and September 22, 1975.

Count 6 charged all defendants with knowingly, and with intent to defraud and mislead, offering for sale and causing to be offered for sale 1,000 tons of misbranded cottonseed meal processed from poison-treated cottonseed, theretofore shipped in Interstate Commerce to Tunica, Mississippi.

Count 1 charged a conspiracy to commit the offenses charged in the remaining counts.

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Hicks was sentenced to three years imprisonment on one count, with eligibility for parole after nine months; also to a fine of \$1,000 and three years probation on each of the remaining counts, the periods of probation to run concurrently with each other.

On Count 1, Barnett was sentenced to imprisonment for six months and to pay one-half of the cost of prosecution; also to pay a fine of \$1,000 and three years probation on each of the remaining counts, the periods of probation to run concurrently with each other.

Barnett & Sons Salvage Company, Ltd., was fined \$250 on each of the six counts.

All defendants have appealed. We affirm as to all.

The action began on September 1, 1975, when Hicks made an arrangement with the Planters Oil Mill, Inc., of Tunica, Mississippi, in which it was agreed that the Mill would receive cottonseed which had been poison-treated for planting purposes, process it into cottonseed meal, and deliver the meal to the railroad agent at Tunica for transportation to various customers in Interstate Commerce. It was further agreed that from this operation the cost of processing and shipping would first be deducted, after which the parties would split the profits, if any. Shipment of the treated seed to Planters began on September 2, contained in bags, marked "Poison-treated—Do not use for food, feed, or oil".

In the meantime, Hicks had made a separate arrangement with Jessie P. Barnett, Jr., of Barnett & Sons Salvage Company, Ltd., in which Barnett agreed that his Company would find buyers for the meal processed from the treated planting cottonseed.

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On September 9, Barnett made a contract with Southern Feed Ingredients Company, a company which deals solely in components for animal feed, by which Barnett was to sell Southern 1,000 tons of cottonseed meal. The record is not clear as to whether Barnett knew initially that the meal was to be manufactured from treated seed, but there is no doubt that he soon learned of it. The serious aspect of this case is that Barnett never informed Southern at any time that the meal was to be processed from cottonseed which had been poison-treated for planting purposes.

At various times and on various dates, within the time period alleged in the indictment, Planters processed the treated cottonseed, loaded the resulting meal onto railroad cars, and consigned the cars to the railroad agent at Tunica. The bills of lading contained the warning, *Fertilizer use only*. Copies of those bills of lading were sent to Barnett & Sons and to Southern.

It was during this period that Mr. Barnett really stuck his hand in the fire by representing to Southern that the warnings appearing on the bills of lading were erroneous, that the meal was fit for animal feed. The invoices from Planters, sent to Hicks and to Barnett & Sons Salvage Company, Ltd., bore the warning "*Fertilizer, chemical or industrial use only*". Not stopping at this, Planters notified both Hicks and Barnett & Sons, by certified letter, return receipt requested, that the Mill had begun consigning meal to the railroad agent and that "we want it fully understood that the products from these seed are only good for fertilizer, chemical or industrial use."

On the dates alleged in the indictments Southern directed the railroad agent to ship the meal to various customers, as therein charged.

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Matters lost no time in coming to a head. One of Southern's customers complained "that the meal had a burned or dark color, and a burned smell". Southern then told Planters to send a sample of the meal to a laboratory in Memphis for analysis. On September 19 the samples were sent. On September 25, the laboratory reported that the samples contained "less than .01 parts per million" of Disyston. The report, however, did not indicate that any test had been conducted for mercury or for PCNB.

The customer also submitted samples of the meal to the state laboratory at Mississippi State University. On September 22, this laboratory notified the customer that the meal samples contained Disyston. The customer then recalled all of the meal that could be traced and shipped it back to Southern. It informed Southern of the situation and also informed Mississippi feed inspectors, as well as investigators for the Food and Drug Administration, that the meal was tainted.

The Food and Drug Administration investigators took samples of the meal at Planters, in Tunica, and from all places to which the meal had been shipped or at which could be found in transit. Tested by Food and Drug Administration laboratories, these samples revealed the presence of mercury, PCNB, and Disyston.

HICKS

Mr. Hicks complains first that the statutes in question are unconstitutional. We have already pointed out the holding of the Supreme Court in *United States v. Lexington Mill Company*, 232 U.S. 399, 34 S.Ct. 337, 58 L.Ed. 658 (1914).

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[1] We agree that, most assuredly, criminal statutes must fairly apprise those who are subject to them as to the conduct which is proscribed.² Even so, "no more than a reasonable degree of certainty can be demanded", *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 72 S.Ct. 329, 331, 96 L.Ed. 367 (1952).

[2] We can attribute no merit whatever to the contention that the statutes left the defendants without fair warning that their acts were illegal. 21 U.S.C. § 331(a) prohibits the "introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated. . . ." 21 U.S.C. § 342(a)(1) defines an adulterated food as one bearing or containing "any poisonous or deleterious substance which may render it injurious to health". 21 U.S.C. § 321(f) specifies that the term "'food' means . . . articles used for food or drink for man or other animals. . . ."

Hicks testified that only by analysis could it be determined whether it would be safe to feed the meal. This does not help him. The cottonseed meal in this case was sold for feed prior to analysis and this was done with Hicks' knowledge. The facts, as previously stated herein, reflects the warnings received by Hicks that the product was unfit for animal feed.

[3] Mr. Hicks complains that he was prejudiced by overly extensive expert testimony adduced on behalf of the government with reference to the harmful effects of mercury, PCNB, and Disyston. Our evaluation of the trial record, however, leaves us with the firm conviction that

² *United States v. Hawes*, 5 Cir. 1976, 529 F.2d 472, 479; *United States v. Insco*, 5 Cir., 1974, 496 F.2d 204, 208.

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the rulings of the trial court on the materiality and relevancy of this testimony were well within its discretion, *United States v. Grimm*, 5 Cir. 1978, 568 F.2d 1136, 1138; *United States v. Brown*, 5 Cir. 1977, 547 F.2d 1264, 1266. Indeed, if Hicks thought that the extensiveness of the proof as to these rather indisputable facts would put the case out of focus, to his prejudice, he could easily have eliminated the hazard by merely stipulating the harmfulness, putting an end of the matter. On the other hand, if there was any doubt about it, the government was entitled to nail it down.

BARNETT

Jessie P. Barnett, on his own behalf and that of Barnett & Sons Salvage, Ltd., urges reversal of their convictions on the grounds of improperly admitted evidence, an allegedly improper notice of an evidentiary fact, insufficient evidence, and improper consideration of a pre-sentence report.

A. Admissibility of Evidence

[4] Twelve railcars of meal were shipped from Planters. By the time the FDA could obtain samples for its tests, meal from three of these cars had been commingled with meal from other sources. Over objection, the District Court admitted samples from all twelve cars, including the three cars containing commingled meal. Barnett contends that the samples taken from the three commingled cars were irrelevant and the admission of the samples constitutes reversible error. We disagree.

This argument tries to slough off the fact that there were nine carloads of meal in which there had been no

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commingling and even as to the three in which there had been commingling, some of the meal had been processed from the Hicks-Barnett treated cottonseed. The samples from all twelve cars revealed the presence of the deleterious substances in question. Even if it was error to admit the samples from the three commingled cars, it was obviously harmless beyond a reasonable doubt and we need not pause for a prolonged discussion of this point.

B. Insufficient Evidence

[5] Barnett maintains that due to his good faith reliance on the Barrow-Agee test that there was insufficient evidence of intent to commit a felony and therefore that his motion for judgment of acquittal should have been granted.

Viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the facts simply do not support this argument. Barnett had received copies of bills of lading, invoices, and a letter from Planters, warning in unequivocal terms that the meal was not to be used for animal feed. Barnett assured Southern that the copies of bills of lading bearing the warning "Fertilizer use only" were in error and that the meal was good for feed use.

Moreover, the record shows that samples were not sent to Barrow-Agee for analysis until September 17, 1975, where they were received on September 19. The Barrow-Agee report was not issued until September 25, 1975. Barnett's assurance to Southern that the meal was safe for feed use took place prior to September 19. All twelve railcars had been shipped from Planters by the time the Barrow-Agee report was issued. Barnett could not have been relying on the Barrow-Agee report when he misled Southern because the report was not yet in existence.

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The argument that Barnett acted in good faith cannot, on this record, be sustained.

C. Judicial Notice of the Absence of Tolerance Standards

[6] At the close of the government's proof in rebuttal, and at the continued behest of the prosecution, the District Court told the jury:

Now, members of the jury, the court takes judicial notice that no regulations prescribed by any governmental agency provide for standards or tolerances relating to the presence of mercury, PCNB, and disyston as components, as allowable components, to be contained in cottonseed meal manufactured and intended to be used for animal feed, that there are no regulations on the subject that have been prescribed allowing the presence of these elements in cottonseed meal intended for consumption in animal feed.

On cross-examination of government witnesses, the defendants attempted to create the impression that there is a government-authorized tolerance level for mercury, PCNB, and disyston. They never proffered evidence of any such tolerances but they repeatedly cross-examined government witnesses as to whether there were such standards. At one point, pursuant to the government's request, the Court directed defense counsel to present the tolerance standards if they were available. Barnett's counsel responded that he only had "some notes" but wanted to ask some questions concerning tolerances "for the later testimony". The Court permitted him to continue.

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At the conclusion of the expert testimony, the government moved the Court to take judicial notice of the absence of tolerances because "it has been made an issue of fact on some of the cross-examination." Barnett's counsel protested on the ground that "it was clear the [Environmental Protection Agency] does in fact have guidelines." The Court deferred ruling until it could examine the regulations. At the conclusion of the government's case-in-chief the government again moved the Court to take the desired judicial notice. An extended discussion ensued in chambers. The Court again deferred ruling. During a week-end recess the Court studied the statutes and regulations and, after the close of rebuttal proof for the government, gave the instruction as above quoted.

In the calmness of judicial review we do not understand exactly how the trial court allowed the government to prevail in this request that it take judicial notice. The defendants had offered no proof that the tolerance standards existed. There was nothing to rebut. The defense had a right to cross-examine the government witnesses in a search for evidence that such standards might exist, but this was far from establishing that they did exist. The defendants having wholly failed to establish the existence of any standards, it would seem hardly necessary that the Court should have entered the lists on the side of the government by informing the jury at the close of the evidence that, as a matter of fact, the standards did not exist. If the government thought that the failure of proof carried with it significantly adverse consequences, it should have had no real trouble producing a qualified witness, in chief, who could have testified that an examination of the Federal Register failed to reveal the existence of any such standards. All of this is especially true when it is remembered that it is not neces-

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sary for the government to prove a negative, *see, e. g., Rogers v. United States*, 8 Cir. 1966, 367 F.2d 998, *cert. denied*, 386 U.S. 943, 87 S.Ct. 976, 17 L.Ed.2d 874 (1967).³

We do not approve the procedure followed here, but, for several reasons, we decline to reverse these convictions on this point.

In the first place, there is not the slightest contention that *what the District Court told the jury was incorrect*. In the second place, the defendants provoked the situation by pursuing the point on cross-examination when they knew, or by investigation of the Federal Register should have known, there were no such tolerance standards. Lastly, it may be said that since the statement was true and the government was under no obligation to prove it in the first place, the error was harmless beyond a reasonable doubt.

D. Sentencing Procedure

The pre-sentence report contained information relative to a prior sale by Barnett of soybean meal which had been processed from beans that had been treated with mercury. A copy of the report was furnished to Barnett and counsel prior to sentence. The trial court thoroughly explored the

³ "The general principle, and we think the correct one, * * * is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control. (Cases cited.)"

Rossi v. United States, 1933, 289 U.S. 89, 91-92, 53 S.Ct. 532, 533, 77 L.Ed. 1051, 1052.

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for the Fifth Circuit*

subject matter of the report with Jessie P. Barnett, Jr. and his counsel. Barnett pointed out that there had been no conviction as a result of this incident, but he did not dispute the basic facts as reported. He claimed that the poisoned soybean meal had been mixed with untreated meal and thereafter shipped to a customer by a third party without Barnett's consent. Barnett said that he had fully cooperated with FDA investigators concerning the matter. Thereupon, the District Court announced that it would request the probation service to make a further investigation into the matter and would give further consideration to the sentence imposed on Count 1 should the Court learn anything "substantially different" within the next thirty days.

Barnett's counsel subsequently filed a motion for reduction of sentence. This motion was supported by affidavits to the effect that the earlier incident occurred through the unintentional and unauthorized intermingling of meal processed from treated beans, with meal processed from uncontaminated beans.

On December 27, 1977, the District Court denied the motion on the ground that there was "no basis in fact for the alteration" requested.

It is undisputed that the sentencing procedure followed by the District Court was in accordance with the requirements of Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure. Barnett contends, however, that F.R.Crim. P. 32(c)(3)(A) failed to accord Barnett those safeguards required as a matter of due process. Specifically, he says that "consideration of the unsworn accusations of a governmental investigative agent over Defendant's total denial of such accusations" contravenes the requirements of the Fifth Amendment to the United States Constitution; that anything less than a full evidentiary hearing constitutes a denial of due process.

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These arguments must be rejected.

[7] A sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446-47, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). For example, in the landmark case of *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), a state sentencing procedure whereby the judge considered information obtained "outside the courtroom from persons whom the defendant has not been permitted to confront or cross-examine" was found not to be constitutionally infirm. *Id.* at 245. Writing for the *Williams* Court, Mr. Justice Black observed that the information necessary for an

intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination . . . [such considerations] admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources. . . . *Id.* at 250, 251, 69 S.Ct. at 1084.

[8] The *Williams* Court, of course did not hold that the sentencing judge's discretion is unlimited. A defendant has a right to "at least minimal safeguards to insure that the sentencing court does not rely on erroneous factual information", *United States v. Espinoza*, 5 Cir. 1973, 481 F.2d 553, 555; see *United States v. Tucker*, *supra* at 447, 92 S.Ct. 589; *Townsend v. Burke*, 334 U.S. 736, 740, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948). Thus we have held that

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where a defendant disputes information considered in imposing a sentence, the defendant must be given "at least some opportunity to rebut that information", *United States v. Espinoza*, *supra* at 556; see *United States v. Ashley*, 5 Cir., 555 F.2d 462, 466, *cert. denied*, 434 U.S. 869, 98 S.Ct. 210, 54 L.Ed.2d 147 (1977); *Shelton v. United States*, 5 Cir. 1974, 497 F.2d 156, 160. See also *United States v. Rollerson*, 5 Cir. 1974, 491 F.2d 1209, 1213; *United States v. Battaglia*, 5 Cir. 1972, 478 F.2d 854.

[9] The right of rebuttal does not require that the sentencing hearing be transformed into a second trial. See *United States v. Espinoza*, *supra*, at 558. See also *United States v. Weston*, 9 Cir. 1971, 448 F.2d 626, 633, *cert. denied*, 404 U.S. 1061, 92 S.Ct. 748, 30 L.Ed.2d 749 (1972). At a minimum it is sufficient if the sentencing judge affords the defendant an opportunity to "comment on any alleged factual inaccuracy." *United States v. Brice*, 5 Cir. 1977, 565 F.2d 336, 337; *United States v. Hodges*, 5 Cir. 1977, 547 F.2d 951, 952; *United States v. Ashley*, *supra*.

Barnett does not contend that he was not afforded an opportunity to rebut the information contained in the pre-sentence report. What he claims is that he "did rebut" it. He therefore argues that the right of rebuttal was insufficient; "anything less than a full evidentiary hearing constitutes a denial of due process". This argument, of course, is knocked from its feet by *Williams v. New York*, *supra*.

Reliance on *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); and *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), is misplaced. These cases held that due process applied to the sentencing stage of a criminal proceeding,

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but this only begins the due process inquiry, for "[O]nce it is determined that due process applies, the question remains what process is due", *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), cited in *Gardner v. Florida*, 430 U.S. 349, 358 n. 9, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

[10] As a matter of due process, a defendant about to be sentenced is not entitled to the same evidentiary protections, such as the right to cross-examine adverse witnesses in a sentencing proceeding, as are available in a trial on guilt or innocence.

[11] In this case, Barnett was fully informed of the contents of the pre-sentence report. He was given every opportunity to state his version of the matter, and he did so. That is the end of it.

CONCLUSION

The judgments of the District Court, as to all appellants, are

AFFIRMED.

**Judgment of the United States Court of Appeals
for the Fifth Circuit**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5811

D. C. DOCKET No. CRD77-29-K

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE P. BARNETT, JR., BARNETT & SONS SALVAGE, LTD.,
and BILLY D. HICKS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Mississippi

Before COLEMAN, CLARK and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

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*Judgment of the United States Court of Appeals
for the Fifth Circuit*

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

January 8, 1979

Issued As Mandate:

19a

**Order Granting Stay of the Issuance of the Mandate
Pending Petition for Writ of Certiorari**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5811

Court of Appeals
Filed
Feb 5 1979

Ward W. Wadsworth
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE P. BARNETT, JR., BARNETT & SONS SALVAGE, LTD.
and BILLY D. HICKS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Mississippi

ORDER

The motion of Appellant, Billy D. Hicks for stay of the issuance of the mandate pending petition for writ of

*Order Granting Stay of the Issuance of the Mandate
Pending Petition for Writ of Certiorari*

certiorari is GRANTED to and including February 15, 1979, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ JAMES P. COLEMAN
United States Circuit Judge

Constitutional Provisions Involved

CONSTITUTION
OF THE
UNITED STATES OF AMERICA

AMENDMENT 5

CRIMINAL ACTIONS—PROVISIONS CONCERNING—DUE PROCESS
OF LAW AND JUST COMPENSATION CLAUSES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SEC. 9, CL. 3. BILL OF ATTAINDER—EX POST FACTO LAWS.

No Bill of Attainder or ex post facto Law shall be passed.

Statutes Involved

Tit. 18, § 2

2. PRINCIPALS.—(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (June 25, 1948, c. 645, § 1, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.)

Tit. 18 § 371

SECTION 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object to the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, c. 645, § 1, 62 Stat. 701.)

Statutes Involved

Tit. 21, § 321

§ 321. DEFINITIONS—GENERALLY

For the purposes of this Act—

(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

PROHIBITED ACTS AND PENALTIES

Tit. 21 § 331

§ 331. PROHIBITED ACTS

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 404 or 505 [21 USCS § 344, or 355].

(e) The refusal to permit access to or copying of any record as required by section 703 [21 USCS § 373]; or the failure to establish or maintain any record, or make any report, required under section 505(i) or (j),

Statutes Involved

507(d) or (g), or 512(j), (l), or (m) [21 USCS §§ 355 (i), (j), 357(d), (g), 360b(j), (l) (b)] or the refusal to permit access to or verification or copying of any such required record.

(f) The refusal to permit entry or inspection as authorized by section 704 [21 USCS § 374].

Tit. 21 § 333

§ 333. PENALTIES

(a) Any person who violates a provision of section 301 [21 USCS § 331] shall be imprisoned for not more than one year or fined not more than \$1,000 or both.

(b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than \$10,000 or both.

Tit. 21 § 342

§ 342. ADULTERATED FOOD

A food shall be deemed to be adulterated—

- (a) Poisonous, insanitary, or deleterious ingredients. (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) (A) if it bears or contains any added poisonous or

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added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; (iii) a color additive or (iv) a new animal drug) which is unsafe within the meaning of section 406 [21 USCS § 346], or (B) if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 408(a) [21 USCS § 346a(a)], or (C) if it is, or it bears or contains any food additive which is unsafe within the meaning of section 409 [21 USCS § 348]: Provided, That where a pesticide chemical has been used in or on a raw agricultural commodity in conformity with an exemption granted or a tolerance prescribed under section 408 [21 USCS § 346a] and such raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating, or milling, the residue of such pesticide chemical remaining in or on such processed food shall, notwithstanding the provisions of sections 406 and 409 [21 USCS §§ 346, 348], not be deemed unsafe if such residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice and the concentration of such residue in the processed food when ready to eat is not greater than the tolerance prescribed for the raw agriculture commodity . . .

Tit. 21 § 343

§ 343. MISBRANDED FOOD

A food shall be deemed to be misbranded—

- (a) False or misleading label. If its labeling is false or misleading in any particular.

Statutes Involved

Tit. 21 § 346a

§ 346a. TOLERANCES FOR PESTICIDE CHEMICALS IN OR ON RAW AGRICULTURAL COMMODITIES

(a) Any poisonous or deleterious pesticide chemical, or any pesticide chemical which is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of pesticide chemicals, as safe for use, added to a raw agricultural commodity, shall be deemed unsafe for the purposes of the application of clause (2) of section 402(a) [21 USCS § 342(a)(2)] unless—

(1) a tolerance for such pesticide chemical in or on the raw agricultural commodity has been prescribed by the Secretary of Health, Education, and Welfare under this section and the quantity of such pesticide chemical in or on the raw agricultural commodity is within the limits of the tolerance so prescribed; or

(2) with respect to use in or on such raw agricultural commodity, the pesticide chemical has been exempted from the requirement of a tolerance by the Secretary under this section.

While a tolerance or exemption from tolerance is in effect for a pesticide chemical with respect to any raw agricultural commodity, such raw agricultural commodity shall not, by reason of bearing or containing any added amount of such pesticide chemical, be considered to be adulterated within the meaning of clause (1) of section 402(a) [21 USCS § 342(a)(1)].

(b) The Secretary shall promulgate regulations establishing tolerances with respect to the use in or on raw agricultural commodities of poisonous or deleterious pesticide

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chemicals and of pesticide chemicals which are not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of pesticide chemicals, as safe for use, to the extent necessary to protect the public health. In establishing any such regulation, the Secretary shall give appropriate consideration, among other relevant factors, (1) to the necessity for the production of an adequate, wholesome, and economical food supply; (2) to the other ways in which the consumer may be affected by the same pesticide chemical or by other related substances that are poisonous or deleterious; and (3) to the opinion of the Secretary of Agriculture as submitted with a certification of usefulness under subsection (l) of this section. Such regulations shall be promulgated in the manner prescribed in subsection (d) or (e) of this section. In carrying out the provisions of this section relating to the establishment of tolerances, the Secretary may establish the tolerance applicable with respect to the use of any pesticide chemical in or on any raw agricultural commodity at zero level if the scientific data before the Secretary does not justify the establishment of a greater tolerance.

(c) The Secretary shall promulgate regulations exempting any pesticide chemical from the necessity of a tolerance with respect to use in or on any or all raw agricultural commodities when such a tolerance is not necessary to protect the public health. Such regulations shall be promulgated in the manner prescribed in subsection (d) or (e) of this section.

(d) (1) Any person who has registered, or who has submitted an application for the registration of, an economic poison under the Federal Insecticide, Fungicide, and Rodenticide Act [7 USCS §§ 121-134 note, 135 and notes

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—135k] may file with the Secretary of Health, Education, and Welfare, a petition proposing the issuance of a regulation establishing a tolerance for a pesticide chemical which constitutes, or is an ingredient of, such economic poison, or exempting the pesticide chemical from the requirement of a tolerance. The petition shall contain data showing—

- (A) the name, chemical identity, and composition of the pesticide chemical;
- (B) the amount, frequency, and time of application of the pesticide chemical;
- (C) full reports of investigations made with respect to the safety of the pesticide chemical;
- (D) the results of tests on the amount of residue remaining, including a description of the analytical methods used;
- (E) practicable methods for removing residue which exceeds any proposed tolerance;
- (F) proposed tolerances for the pesticide chemical if tolerances are proposed; and
- (G) reasonable grounds in support of the petition.

Samples of the pesticide chemical shall be furnished to the Secretary upon request. Notice of the filing of such petition shall be published in general terms by the Secretary within thirty days after filing. Such notice shall include the analytical methods available for the determination of the residue of the pesticide chemical for which a tolerance or exemption is proposed.

(2) Within ninety days after a certification of usefulness by the Secretary of Agriculture under subsection (1) with respect to the pesticide chemical shall after

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giving due consideration to the data submitted in the petition or otherwise before him, by order make public a regulation—

- (A) establishing a tolerance for the pesticide chemical named in the petition for the purposes for which it is so certified as useful, or
- (B) exempting the pesticide chemical from the necessity of a tolerance for such purposes,

unless within such ninety-day period the person filing the petition requests that the petition be referred to an advisory committee or the Secretary within such period otherwise deems such referral necessary, in either of which events the provisions of paragraph (3) of this subsection shall apply in lieu hereof.

(3) In the event that the person filing the petition requests, within ninety days after a certification of usefulness by the Secretary of Agriculture under subsection (1) with respect to the pesticide chemical named in the petition, that the petition be referred to an advisory committee, or in the event the Secretary of Health, Education, and Welfare within such period otherwise deems such referral necessary, the Secretary of Health, Education, and Welfare shall forthwith submit the petition and other data before him to an advisory committee to be appointed in accordance with subsection (g) of this section. As soon as practicable after such referral, but not later than sixty days thereafter, unless extended as hereinafter provided, the committee shall, after independent study of the data submitted to it by the Secretary and other data before it, certify to the Secretary a report and recommendations on the proposal in the petition to the Secretary, together with all underlying data and a statement of the reasons or basis for the recom-

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mendations. The sixty-day period provided for herein may be extended by the advisory committee for an additional thirty days if the advisory committee deems this necessary. Within thirty days after such certification, the Secretary shall, after giving due consideration to all data then before him, including such report, recommendations, underlying data, and statement, by order make public a regulation—

(A) establishing a tolerance for the pesticide chemical named in the petition for the purposes for which it is so certified as useful; or

(B) exempting the pesticide chemical from the necessity of a tolerance for such purposes.

(4) The regulations published under paragraph (2) or (3) of this subsection will be effective upon publication.

(5) Within thirty days after publication, any person adversely affected by a regulation published pursuant to paragraph (2) or (3) of this subsection, or pursuant to subsection (e), may file objections thereto with the Secretary, specifying with particularity the provisions of the regulation deemed objectionable, stating reasonable grounds therefor, and requesting a public hearing upon such objection. A copy of the objections filed by a person other than the petitioner shall be served on the petitioner, if the regulation was issued pursuant to a petition. The petitioner shall have two weeks to make a written reply to the objections. The Secretary shall thereupon, after due notice, hold such public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objection. Any report, recommendations, underlying data, and reasons certified to the Secretary by an advisory committee shall be made a

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part of the record of the hearing, if relevant and material, subject to the provisions of section 7(c) of the Administrative Procedure Act (5 U. S. C. sec. 1006(c)). The National Academy of Sciences shall designate a member of the advisory committee to appear and testify at any such hearing with respect to the report and recommendations of such committee upon request of the Secretary, the petitioner, or the officer conducting the hearing: Provided, That this shall not preclude any other member of the advisory committee from appearing and testifying at such hearing. As soon as practicable after completion of the hearing, the Secretary shall act upon such objections and by order make a public regulation. Such regulation shall be based only on substantial evidence of record at such hearing, including any report, recommendations, underlying data, and reasons certified to the Secretary by an advisory committee, and shall set forth detailed findings of fact upon which the regulation is based. No such order shall take effect prior to the ninetieth day after its publication, unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order of his findings as to such conditions.

(e) The Secretary may at any time, upon his own initiative or upon the request of any interested person, propose the issuance of a regulation establishing a tolerance for a pesticide chemical or exempting it from the necessity of a tolerance. Thirty days after publication of such a proposal, the Secretary may by order publish a regulation based upon the proposal which shall become effective upon publication unless within such thirty-day period a person who has registered, or who has submitted an application for the registration of, an economic poison under the Federal In-

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secticide, Fungicide, and Rodenticide Act [7 USCS §§ 121-134 note, 135 and notes—135k] containing the pesticide chemical named in the proposal, requests that the proposal be referred to an advisory committee. In the event of such a request, the Secretary shall forthwith submit the proposal and other relevant data before him to an advisory committee to be appointed in accordance with subsection (g) of this section. As soon as practicable after such referral, but not later than sixty days thereafter, unless extended as hereinafter provided, the committee shall, after independent study of the data submitted to it by the Secretary and other data before it, certify to the Secretary a report and recommendations on the proposal together with all underlying data and a statement of the reasons or basis for the recommendations. The sixty-day period provided for herein may be extended by the advisory committee for an additional thirty days if the advisory committee deem this necessary. Within thirty days after such certification, the Secretary may, after giving due consideration to all data before him, including such report, recommendations, underlying data and statement, by order publish a regulation establishing a tolerance for the pesticide chemical named in the proposal or exempting it from the necessity of a tolerance which shall become effective upon publication. Regulations issued under this subsection shall upon publication be subject to paragraph (5) of subsection (d).

(f) All data submitted to the Secretary or to an advisory committee in support of a petition under this section shall be considered confidential by the Secretary and by such advisory committee until publication of a regulation under paragraph (2) or (3) of subsection (d) of this section. Until such publication, such data shall not be revealed to any person other than those authorized by the

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Secretary or by an advisory committee in the carrying out of their official duties under this section.

(g) Whenever the referral of a petition or proposal to an advisory committee is requested under this section, or the Secretary otherwise deems such referral necessary the Secretary shall forthwith appoint a committee of competent experts to review the petition or proposal and to make a report and recommendations thereon. Each such advisory committee shall be composed of experts, qualified in the subject matter of the petition and of adequately diversified professional background selected by the National Academy of Sciences and shall include one or more representatives from land-grant colleges. The size of the committee shall be determined by the Secretary. Members of an advisory committee shall receive compensation and travel expenses in accordance with subsection (b)(5) (D) of section 706 [21 USCS § 376]. The members shall not be subject to any other provisions of law regarding the appointment and compensation of employees of the United States. The Secretary shall furnish the committee with adequate clerical and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(h) A person who has filed a petition or who has requested the referral of a proposal to an advisory committee in accordance with the provisions of this section, as well as representatives of the Department of Health, Education, and Welfare, shall have the right to consult with any advisory committee provided for in subsection (g) in connection with the petition or proposal.

(i) (1) In a case of actual controversy as to the validity of any order under subsection (d) (5), (e), or (l) any person who will be adversely affected by such order may

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obtain judicial review by filing in the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within sixty days after the entry of such order, a petition praying that the order be set aside in whole or in part.

(2) In the case of a petition with respect to an order under subsection (d) (5) or (e), a copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him for that purpose, and thereupon the Secretary shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part. The findings of the Secretary with respect to questions of fact shall be sustained if supported by substantial evidence when considered on the record as a whole, including any report and recommendation of an advisory committee.

(3) In the case of a petition with respect to an order under subsection (l), a copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary of Agriculture, or any officer designated by him for that purpose, and thereupon the Secretary shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part. The findings of the Secretary with respect to questions of fact shall be sustained if supported by

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substantial evidence when considered on the record as a whole.

(4) If application is made to the court for leave to adduce additional evidence, the court may order such additional evidence to be taken before the Secretary of Health, Education and Welfare or the Secretary of Agriculture, as the case may be, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper, if such evidence is material and there were reasonable grounds for failure to adduce such evidence in the proceedings below. The Secretary of Health, Education, and Welfare or the Secretary of Agriculture, as the case may be, may modify his findings as to the facts and order by reason of the additional evidence so taken, and shall file with the court such modified findings and order.

(5) The judgment of the court affirming or setting aside, in whole or in part, any order under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code. The commencement of proceedings under this section shall not, unless specifically ordered by the court to the contrary, operate as a stay of an order. The courts shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this section.

(j) The Secretary may, upon the request of any person who has obtained an experimental permit for a pesticide chemical under the Federal Insecticide, Fungicide, and Rodenticide Act [7 USCS §§ 121-134 note, 135 and notes—135k] or upon his own initiative, establish a temporary tolerance for the pesticide chemical for the uses covered

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by the permit whenever in his judgment, such action is deemed necessary to protect the public health, or may temporarily exempt such pesticide chemical from a tolerance. In establishing such a tolerance, the Secretary shall give due regard to the necessity for experimental work in developing an adequate, wholesome, and economical food supply and to the limited hazard to the public health involved in such work when conducted in accordance with applicable regulations under the Federal Insecticide, Fungicide, and Rodenticide Act [7 USCS §§ 121-134 note, 135 and notes-135k].

(k) Regulations affecting pesticide chemicals in or on raw agricultural commodities which are promulgated under the authority of section 406(a) [21 USCS § 346(a)] upon the basis of public hearings instituted before January 1, 1953, in accordance with section 701(e) [21 USCS § 371(e)], shall be deemed to be regulations under this section and shall be subject to amendment or repeal as provided in subsection (m).

(l) The Secretary of Agriculture, upon request of any person who has registered, or who has submitted an application for the registration of, an economic poison under the Federal Insecticide, Fungicide, and Rodenticide Act [7 USCS §§ 121-134 note, 135 and notes—135k], and whose request is accompanied by a copy of a petition filed by such person under subsection (d)(1) with respect to a pesticide chemical which constitutes, or is an ingredient of, such economic poison, shall within thirty days or within sixty days if upon notice prior to the termination of such thirty days the Secretary deems it necessary to postpone action for such period, on the basis of data before him, either—

(1) certify to the Secretary of Health, Education, and Welfare that such pesticide chemical is useful for the

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purpose for which a tolerance or exemption is sought; or (2) notify the person requesting the certification of his proposal to certify that the pesticide chemical does not appear to be useful for the purpose for which a tolerance or exemption is sought, or appears to be useful for only some of the purposes for which a tolerance or exemption is sought.

In the event that the Secretary of Agriculture takes the action described in clause (2) of the preceding sentence, the person requesting the certification, within one week after receiving the proposed certification, may either (A) request the Secretary of Agriculture to certify to the Secretary of Health, Education, and Welfare on the basis of the proposed certification; (B) request a hearing on the proposed certification or the parts thereof objected to; or (C) request both such certification and such hearing. If no such action is taken, the Secretary may by order make the certification as proposed. In the event that the action described in clause (A) or (C) is taken, the Secretary shall by order make the certification as proposed with respect to such parts thereof as are requested. It [In] the event a hearing is requested, the Secretary of Agriculture shall provide opportunity for a prompt hearing. The certification of the Secretary of Agriculture as the result of such hearing shall be made by order and shall be based only on substantial evidence of record at the hearing and shall set forth detailed findings of fact. In no event shall the time elapsing between the making of a request for a certification under this subsection and final certification by the Secretary of Agriculture exceed one hundred and sixty days. The Secretary shall submit to the Secretary of Health, Education, and Welfare with any certification of usefulness under this subsection an opinion, based on the data before him, whether the tolerance or exemption proposed by the

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petitioner reasonably reflects the amount of residue likely to result when the pesticide chemical is used in the manner proposed for the purpose for which the certification is made. The Secretary of Agriculture, after due notice and opportunity for public hearing, is authorized to promulgate rules and regulations for carrying out the provisions of this subsection.

(m) The Secretary of Health, Education, and Welfare shall prescribe by regulations the procedure by which regulations under this section may be amended or repealed, and such procedure shall conform to the procedure provided in this section for the promulgation of regulations establishing tolerances, including the appointment of advisory committees and the procedure for referring petitions to such committees.

(n) The provisions of section 303(c) of the Federal Food, Drug, and Cosmetic Act [21 USCS § 333(c)] with respect to the furnishing of guaranties shall be applicable to raw agricultural commodities covered by this section.

(o) The Secretary of Health, Education, and Welfare shall by regulation require the payment of such fees as will in the aggregate, in the judgment of the Secretary, be sufficient over a reasonable term to provide, equip, and maintain an adequate service for the performance of the Secretary's functions under this section. Under such regulations, the performance of the Secretary's services or other functions pursuant to this section, including any one or more of the following, may be conditioned upon the payment of such fees: (1) The acceptance of filing of a petition submitted under subsection (d); (2) the promulgation of a regulation establishing a tolerance, or an exemption from the necessity of a tolerance, under this section, or the

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amendment or repeal of such a regulation; (3) the referral of a petition or proposal under this section to an advisory committee; (4) the acceptance for filing of objections under subsection (d)(5); or (5) the certification and filing in court of a transcript of the proceedings and the record under subsection (i)(2). Such regulations may further provide for waiver or refund of fees in whole or in part when in the judgment of the Secretary such waiver or refund is equitable and not contrary to the purposes of this subsection.

Tit. 21 § 348

§ 348. FOOD ADDITIVES

(a) UNSAFE FOOD ADDITIVES. A food additive shall, with respect to any particular use or intended use of such additives, be deemed to be unsafe for the purposes of the application of clause (2)(C) of section 402(a) [21 USCS § 342(a)(2)(C)], unless—

- (1) it and its use or intended use conform to the terms of an exemption which is in effect pursuant to subsection (i) of this section; or
- (2) there is in effect, and it and its use or intended use are in conformity with, a regulation issued under this section prescribing the conditions under which such additive may be safely used.

While such a regulation relating to a food additive is in effect, a food shall not, by reason of bearing or containing such an additive in accordance with the regulation, be considered adulterated within the meaning of clause (1) of section 402(a) [21 USCS § 342(a)(1)].

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- (b) PETITION TO ESTABLISH SAFETY. (1) Any person may, with respect to any intended use of a food additive, file with the Secretary a petition proposing the issuance of a regulation prescribing the conditions under which such additive may be safely used.
- (2) Such petition shall, in addition to any explanatory or supporting data, contain—
- (A) the name and all pertinent information concerning such food additive, including, where available, its chemical identity and composition;
 - (B) a statement of the conditions of the proposed use of such additive, including all directions, recommendations, and suggestions proposed for the use of such additive, and including specimens of its proposed labeling;
 - (C) all relevant data bearing on the physical or other technical effect such additive is intended to produce, and the quantity of such additive required to produce such effect;
 - (D) a description of practicable methods for determining the quantity of such additive in or on food, and any substance formed in or on food, because of its use; and
 - (E) full reports of investigations made with respect to the safety for use of such additive, including full information as to the methods and controls used in conducting such investigations.
- (3) Upon request of the Secretary, the petitioner shall furnish (or, if the petitioner is not the manufacturer of such additive, the petitioner shall have the manufacturer of such additive furnish, without disclosure to

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the petitioner) a full description of the methods used in, and the facilities and controls used for, the production of such additive.

(4) Upon request of the Secretary, the petitioner shall furnish samples of the food additive involved, or articles used as components thereof, and of the food in or on which the additive is proposed to be used.

(5) Notice of the regulation proposed by the petitioner shall be published in general terms by the Secretary within thirty days after filing.

(c) ACTION ON THE PETITION. (1) The Secretary shall—

(A) by order establish a regulation (whether or not in accord with that proposed by the petitioner) prescribing, with respect to one or more proposed uses of the food additive involved, the conditions under which such additive may be safely used (including, but not limited to, specifications as to the particular food or classes of food in or in which such additive may be used, the maximum quantity which may be used or permitted to remain in or on such food, the manner in which such additive may be added to or used in or on such food, and any directions or other labeling or packaging requirements for such additive deemed necessary by him to assure the safety of such use), and shall notify the petitioner of such order and the reasons for such action; or

(B) by order deny the petition, and shall notify the petitioner of such order and of the reasons for such action.

(2) The order required by paragraph (1)(A) or (B) of this subsection shall be issued within ninety days after

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the date of filing of the petition, except that the Secretary may (prior to such ninetieth day), by written notice to the petitioner, extend such ninety-day period to such time (not more than one hundred and eighty days after the date of filing of the petition) as the Secretary deems necessary to enable him to study and investigate the petition.

(3) No such regulation shall issue if a fair evaluation of the data before the Secretary—

(A) fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe: Provided, That no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal, except that this proviso shall not apply with respect to the use of a substance as an ingredient of feed for animals which are raised for food production, if the Secretary finds (i) that, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additive will not adversely affect the animals for which such feed is intended, and (ii) that no residue of the additive will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (f) and (g) in any edible portion of such animal after slaughter or in any food yielded by or derived from the living animal; or

(B) shows that the proposed use of the additive would promote deception of the consumer in violation of this Act or would otherwise result in adulteration or in misbranding of food within the meaning of this Act.

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(4) If, in the judgment of the Secretary, based upon a fair evaluation of the data before him, a tolerance limitation is required in order to assure that the proposed use of an additive will be safe, the Secretary—

(A) shall not fix such tolerance limitation at a level higher than he finds to be reasonably required to accomplish the physical or other technical effect for which such additive is intended; and

(B) shall not establish a regulation for such proposed use if he finds upon a fair evaluation of the data before him that such data do not establish that such use would accomplish the intended physical or other technical effect.

(5) In determining, for the purposes of this section, whether a proposed use of a food additive is safe, the Secretary shall consider among other relevant factors—

(A) the probable consumption of the additive and of any substance formed in or on food because of the use of the additive;

(B) the cumulative effect of such additive in the diet of man or animals, taking into account any chemically or pharmacologically related substance or substances in such diet; and

(C) safety factors which in the opinion of experts qualified by scientific training and experience to evaluate the safety of food additives are generally recognized as appropriate for the use of animal experimentation data.

(d) REGULATION ISSUED ON SECRETARY'S INITIATIVE. The Secretary may at any time, upon his own initiative, propose the issuance of a regulation prescribing, with re-

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spect to any particular use of a food additive, the conditions under which such additive may be safely used, and the reasons therefor. After the thirtieth day following publication of such a proposal, the Secretary may by order establish a regulation based upon the proposal.

(e) PUBLICATION AND EFFECTIVE DATE OF ORDERS. Any order, including any regulation established by such order, issued under subsection (c) or (d) of this section, shall be effective upon publication, but the Secretary may stay such effectiveness if, after issuance of such order, a hearing is sought with respect to such order pursuant to subsection (f).

(f) OBJECTIONS AND PUBLIC HEARING. (1) Within thirty days after publication of an order made pursuant to subsection (c) or (d) of this section, any person adversely affected by such an order may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating reasonable grounds therefor, and requesting a public hearing upon such objections. The Secretary shall, after due notice, as promptly as possible hold such public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public.

(2) Such order shall be based upon a fair evaluation of the entire record at such hearing, and shall include a statement setting forth in detail the findings and conclusions upon which the order is based.

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(3) The Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication, unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.

(g) JUDICIAL REVIEW. (1) In a case of actual controversy as to the validity of any order issued under subsection (f), including any order thereunder with respect to amendment or repeal of a regulation issued under this section, any person who will be adversely affected by such order may obtain judicial review by filing in the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within sixty days after the entry of such order, a petition praying that the order be set aside in whole or in part.

(2) A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him for that purpose, and thereupon the Secretary shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm or set aside the order complained of in whole or in part. Until the filing of the record the Secretary may modify or set aside his order.

(3) The court, on such judicial review, shall not sustain the order of the Secretary if he failed to comply

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with any requirement imposed on him by subsection (f) (2) of this section.

(4) If application is made to the court for leave to adduce additional evidence, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may seem proper, if such evidence is material and there were reasonable grounds for failure to adduce such evidence in the proceedings below. The Secretary may modify his findings as to the facts and order by reason of the additional evidence so taken, and shall file with the court such modified findings and order.

(5) The judgment of the court affirming or setting aside, in whole or in part, any order under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code. The commencement of proceedings under this section shall not, unless specifically ordered by the court to the contrary, operate as a stay of an order.

(h) AMENDMENT OR REPEAL OF REGULATIONS. The Secretary shall by regulation prescribe the procedure by which regulations under the foregoing provisions of this section may be amended or repealed, and such procedure shall conform to the procedure provided in this section for the promulgation of such regulations.

(i) EXEMPTIONS FOR INVESTIGATIONAL USE. Without regard to subsections (b) to (h), inclusive of this section, the Secretary shall by regulation provide for exempting from the requirements of this section any food additive, and

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any food bearing or containing such additive, intended solely for investigational use by qualified experts when in his opinion such exemption is consistent with the public health.